

**UNITED STATES COURT OF APPEALS  
SEVENTH CIRCUIT**

NATIONAL LABOR RELATIONS BOARD,	)	
	)	
	)	
Petitioner,	)	
	)	
v.	)	Case No. 18-1774
	)	
NEISES CONSTRUCTION, INC.,	)	
	)	
Respondent.	)	
	)	
JOHN DOES 1 through 5,	)	
FICTITIOUS RESPONDENTS.	)	

**RESPONDENT’S RESPONSE TO PETITION  
OF THE NATIONAL LABOR RELATIONS BOARD  
FOR AN ADJUDICATION IN CIVIL CONTEMPT, ASSESSMENT OF  
NONCOMPLIANCE FINES AND OTHER REQUESTED CIVIL RELIEF**

Respondent Neises Construction Corp. (“Neises”) responds to the National Labor Relations Board’s (“Board”) Petition alleging violation of a prior Consent Order and Judgment of this Court and shows the Petition should be dismissed.

The Board provides this Court no competent evidence by affidavit as part of the record to support any of its allegations of fact. This is fatal. *Autotech Technologies LP v. Integral Research & Devel. Corp.*, 499 F.3d 737, 752 (7th Cir. 2007). Neither does the Petition identify a specific violation of the Consent Order and Judgment. Neises’s Answer and Affirmative Defenses responds to each of the numbered allegations in the Petition as admitted or denied beginning on page 15, *infra*.

As background, this case involves approximately nine employees of Neises performing concrete residential construction at its Crown Point, Indiana, location. Efforts to reach a first collective bargaining agreement are in issue. A summary of the background is appropriate for context.

### **PROCEDURAL BACKGROUND**

The case began when the Board entered a default judgment against Neises on March 29, 2018, for failure to appear and defend an unfair labor practice charge. *Neises Constr. Co.*, 360 N.L.R.B. No. 52 (2018). It ordered Neises to undertake four directives, (1) to bargain with the Indiana/Kentucky/Ohio Regional Council of Carpenters (“Union”) on request and if an agreement is reached, (2) to “embody the understanding in a signed agreement,” (3) post a workplace notice of the Order, and (4) attest to steps taken to comply. *Id.* at 3.

The Board sought Summary Entry of a Judgment to enforce that Order on April 11, 2018, and four weeks later the Board obtained a Judgment enforcing the Order against Neises due to its failure to appear and answer the Complaint and Petition for Enforcement. *See* Case No. 18-1774, ECF No. 2-1 (May 11, 2018). The case was closed on July 3, 2018. ECF No. 3.

The following year, the Board filed a petition for adjudication of civil contempt. ECF No. 5. The parties reached a stipulation, a proposed consent order,

and joint motion. ECF No. 6. The motion was granted on May 3, 2019. ECF No. 8. An agency closing letter issued on June 26, 2019. ECF No. 9.

On February 6, 2020, the Board filed another petition for adjudication of civil contempt. ECF No. 10. Neises entered an appearance and the matter was referred to a Special Master, ECF No. 19. The parties reached a Stipulation and a Consent Order on May 3, 2019. ECF No. 20.

The Special Master's Report presented the Stipulation and Consent Order agreed to by the parties. *See* ECF No. 20 (June 2, 2020).

Paragraph 2 of the Stipulation for Entry of Consent Order, ECF No. 20-2 p.3 (of 11) (June 2, 2020), stated:

The 2019 Consent Order requires Neises, among other things, to meet and bargain with the Union no less than once every 30 days until Neises and the Union have reached an understanding or a lawful impasse and, if an understanding is reached, that it be embodied in a signed agreement. It also provides for this Court's imposition of a prospective fine against Neises in the amount of \$7,500.00 for each and every future violation of the 2019 Consent Order, including for each occasion Neises fails without good cause to meet and bargain with the Union as required by the 2019 Consent Order.

Paragraph 6 of the Stipulation for Entry of Consent Order, ECF No. 20-2 pp. 3-4 (of 11) (June 2, 2020), states:

This Stipulation and the proposed Consent Order contain the entire agreement between the parties, and there is no other agreement of any kind, verbal or otherwise, with

respect to the subjects of this Stipulation and the proposed Consent Order.

Paragraph V of the proposed Consent Order, ECF No. 20-3, stated: “IT IS FURTHER ORDERED that Neises will continue to meet and bargain with the Union no less than once every 30 days, until Neises and the Union have reached an understanding or lawful impasse, and if an understanding is reached, will embody the understanding in a signed agreement.”

The Stipulation and Consent Order were approved on June 22, 2020. ECF No. 21. On August 14, 2020, the Court dismissed the matter. ECF No. 22.

On April 12, 2021, the Board filed the instant Petition for Adjudication of Civil Contempt. ECF No. 24.

### **BACKGROUND FACTS**

The Court was informed in the 2020 proceeding that the Union and Neises met and bargained in 2019 on June 18, July 5, July 18, August 19, September 26, November 14 and November 26, 2019. ECF No. 15 at 2.

For 2020, the parties met, as the Board has been advised, on March 2, 2020, March 18, 2020, March 20, 2020, April 17, 2020, May 7, 2020, May 14, 2020, May 28, 2020, June 17, 2020, June 26, 2020, July 8, 2020, and August 4, 2020. After August 4, 2020, the Union refused to meet with Neises. *See* Exhibit A (Affidavit of Brian Neises, NLRB Case No. 13-CB-273050).

Through August 4, 2020, Neises and the Union agreed to numerous tentative agreements on mandatory and non-mandatory subjects of bargaining, including Union Recognition, Union Security, Hours of Work, Overtime, the mechanics for Payment of Wages, General Working Conditions, Hiring, Scope, Adjustment of Disputes, Assignment of Work, Entire Agreement of the Parties, Invalidity and Severability. Union negotiators then demanded Neises provide written proposals before any meeting. If not, the Union would refuse to meet and bargain. When Neises objected, the Union refused all efforts to resume bargaining.

Neises filed a refusal to bargain charge with Board Region 13 alleging the Union's refusal to meet with it and bargain upon a nonmandatory subject of bargaining violated Sections 8(a)(1) and (5) of the Act. Case No. 13-CB-264210 (Aug. 6, 2020). Exhibit B. The Region dismissed the Charge.

Neises continued to request the Union bargain with it every month from September 2020 through April 2021. The Union refused to meet. Neises filed another refusal to bargain charge against the Union for refusing to bargain for the past six months on February 19, 2021. Case No. 13-CB-273050. Exhibit C. The Region dismissed that Charge on April 20, 2021.

### **NEISES'S SUMMARY RESPONSE**

Neises denies the allegations in the Petition and the remedies requested by the Board; neither are supported by the facts nor are they appropriate. The Petition

does not identify a single affirmative provision in the Judgment that may have been violated.

Neises submits it should not be held in contempt of this Court's Judgment because it met and bargained with the Union in good faith, in a reasonably timely manner, corresponded with the Union in establishing meeting times, submitted bargaining proposals, agreed to proposals with the Union, entered numerous tentative agreements with the Union, and even accorded the convenience of meeting with the Union at the Union's office.

The Court's Judgment required Neises to bargain "upon request" by the Union. The Company met and bargained with the Union and requested bargaining dates at and after each bargaining session. Neither the Judgment nor the Order required the Company to be solely responsible to coordinate bargaining sessions to ensure that bargaining occurred every 30 days. Nor did it anticipate that Neises would violate the Order if the Union refused to meet with Neises and thwart Neises's ability to comply with the Judgment. These facts are not alleged.

Neises took reasonable steps to comply with the Judgment and Order. The parties made substantial progress in negotiating their first labor agreement. The parties regularly exchanged texts and emails regarding the scheduling of bargaining sessions.

**ACTION THE NLRB CONTENDS WERE NOT COMPLIED WITH**

Obviously, the parties disagree. Neises recognizes this Court is not a place where disputed facts are normally determined. While the Court may be left to determine contempt with considerable uncertainty of the actual/disputed facts, Neises wants to resolve this case with the Court resolving the Board's Petition based on accurate facts related to the affirmative obligations established in the Court's Judgment, rather than unsworn new allegations and assumptions of facts applied to events after the prior 2020 Judgment and other obligations required of the parties under Section 8(d) of the Labor Act, 29 U.S.C. §158(d).<sup>1</sup>

The Board establishes no facts to dispute Neises met with the Union as ordered and bargained with it. Paragraph 16 of the Petition acknowledges that "Neises and the Union met on multiple occasions and had productive negotiations, reaching tentative agreements" following the 2020 Consent Order.

Beginning July 6, 2020, the Union demanded that Neises deliver all its proposals in writing to the Union before meeting again. Petition ¶20. When Neises protested, the next day, July 7, 2020, the Union again demanded advance

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<sup>1</sup>The Board has the burden of proving "by clear and convincing evidence, that the respondent has failed to comply with the decree of the court." *NLRB v. Nickey Chevrolet Sales, Inc.*, 493 F.2d 103, 106 (7th Cir. 1974). Under Section 8(d) of the Act, "it is 'clear that the Board may not, either directly or indirectly, compel concessions or otherwise sit in judgment upon the substantive terms of collective bargaining agreements'" *H.K. Porter Co. v. NLRB*, 397 U.S. 99, 106 (1970), quoting *NLRB v. American Nat'l Ins. Co.*, 343 U.S. 395, 404 (1952).

written proposals as a condition for meeting: “Dyer responded she would not meet unless” this was done. Petition ¶21.<sup>2</sup>

Similarly, paragraph 27 asserts the submission of proposals were “unpalatable” to the Union, regressive, and “indicative of bad faith, and paragraph 28 alleges these were “unacceptable.”<sup>3</sup> Notably, none of the assertions the Petition alleges compelled the Union to agree to any term or complained that the proposals

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<sup>2</sup>This Court has held a party’s demand to “submit its proposals in writing” before continuing negotiation “has unlawfully refused to bargain.” *See Beverly Farm Foundation, Inc. v. NLRB*, 144 F.3d 1048, 1053 (7th Cir. 1998), citing *NLRB v. United States Cold Storage Corp.*, 203 F.2d 924, 928 (5th Cir. 1953). In *Beverly*, the employer demanded the union submit new proposals in writing before it would resume bargaining, the union refused, and the Board found the employer’s demand violated Sections 8(a)(1) and (5) of the Labor Act. This is settled Board law. *Altura Comm. Solutions, LLC*, 369 N.L.R.B. No. 85 at 48 (2020) (a party “may not set preconditions that must be satisfied before it will agree to resume face-to-face meetings”); *UPS Supply Chain Solutions, Inc.*, 366 N.L.R.B. No. 111 at 2 (2018) (“it is a per se violation of Section 8(a)(5)...for either party to hold collective bargaining hostage to unilaterally imposed preconditions on negotiations”); *Vanguard Fire & Supply Co., Inc.*, 345 N.L.R.B. 1016, 1017 (2005) (rejecting insistence of an advance “agenda as a precondition to bargaining”), *enf’d*, 468 F.3d 952 (6th Cir. 2006); *Alle Arecibo Corp.*, 267 N.L.R.B. 1267, 1273 (1982) (a party “may not insist that negotiations be conducted over the phone or by mail.”).

<sup>3</sup>These allegations undermine the Supreme Court’s “freedom of contract” trilogy of *NLRB v. American National Insurance Co.*, 343 U.S. 395 (1952); *NLRB v. Insurance Agents’ Union*, 361 U.S. 477 (1960); and *American Ship Building Co. v. NLRB*, 380 U.S. 300 (1965), that employer’s are free to withdraw “from tentative agreements” without “an explanation of good cause for doing so.” *White Cap Co.*, 325 N.L.R.B. 1166, 1171 (1998) (Chairman Gould concurring) (“it has been the default practice of collective-bargaining negotiations to allow withdrawal at will from tentative agreements prior to final agreement”).



involved nonmandatory subjects of bargaining that a party cannot insist upon to impasse. The Petition's allegations are especially provocative because Neises has had stable collective bargaining relationships with two other unions, Teamsters Local 142 and Operating Engineers, Local 150.

Neises had no prior understanding of the Carpenters' collective bargaining terminology, no understanding of how its contractual provisions applied or familiarity with the Carpenters' union grievance process. Neises needed to ensure understandable terminology in a final collective bargaining agreement, foreshadowing the Board's description of these efforts at clarity as regressive<sup>4</sup> and its numerous references to Neises's determination to seek mutual understanding as bad faith.<sup>5</sup>

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<sup>4</sup>“[W]e underscore our agreement with the Board's clarification that as a matter of law, regressive offers are not per se illegal. That is, the label ‘regressive’ has no independent legal force absent other factors,” *Carey Salt v. NLRB*, 736 F.3d 405, 418 (5th Cir. 2015); *Chicago Local No. 459-3M, Graphics Comm. Int'l Union*, 206 F.3d 22, 32-33 (D.C. Cir. 2000) (regressive bargaining is not generally prohibited); *Neon Sign Corp. v. NLRB*, 602 F.2d 1203, 1205 (5th Cir. 1979) (the union's response to employer's hard bargaining proposal was economic activity, a strike, that “ended the bargaining.”).

<sup>5</sup>Whether a contract proposal or its “substantive terms” is acceptable is determined by the parties “across the bargaining table, not by the Board.” *NLRB v. American Natl. Ins. Co.*, 343 U.S. 395, 409 (1952) (the Board may not reject a proposal “covering any ‘condition of employment’ as *per se* violations of the Act.”). “[C]ollective bargaining is wide open and rough and tumble where both parties use their resources and economic strength as best they can.” *White Cap, Inc.*, 325 N.L.R.B. at 1172. “It is not for the Board to decide the good or bad faith

(continued...)

It cannot be overlooked that the Petition fails to connect post-Judgment alleged facts to the affirmative obligations in the Consent Order.

### **ANALYSIS OF THE ALLEGED PENALTIES**

The Board concludes its Petition by seeking penalties against Neises.

Previously, the Board sought a \$17,000.00 penalty and obtained it from Neises as a condition for it to return to bargaining. There is no admission by Neises or finding by the Court that Neises ever violated the Court's Judgment.

Neises contends there is no basis for the Board's suggestion at 18 ¶(e) for the Court to award a \$20,000 contempt fine for two meetings where the Board alleges negotiations occurred and proposals were presented, plus \$200.00 per day beginning, presumably, thirty days after August 4 during which the Union refused to meet with Neises, to wit (as of April 27, 2021), 266 days passed amounting to \$53,200.00. Petition at 15 ¶(e). The Petition submits no reference to any evidence suggesting what provision of the Consent Order was violated to support a penalty and how to apply it.

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<sup>5</sup>(...continued)  
of the parties based on the correctness or incorrectness of the reasons they put forward in support of their bargaining positions.” *Phillips 66*, 369 N.L.R.B. No. 13 at 5 (2020). The Act does not authorize the Board to act as an arbiter of the sort of economic weapons the parties can use or deny weapons to one party because of the Board's assessment of their relative bargaining power. *Charles D. Bonanno Linen Serv., Inc. v. NLRB*, 454 U.S. 404, 418 (1982).

The same foundational questions apply to the Petition's new request at 19 ¶4 for prospective fines of \$20,000 for each future violation and \$300.00 per day whenever thirty days pass without meeting with the Union and applying a standardless lack of good cause, \$5,000.00 fines upon each agent acting "in concert" with Neises (whether or not related to Union activity), and \$100.00 per day for any other time "the court finds such violations have continued."

The Petition's request for other penalties includes authority for the Board to supervise Neises's bargaining, a power the Congress refused to delegate to the Board within its available remedial powers under Section 10(c) of the Labor Act, 29 U.S.C. §160(c). With no finding that Neises recently committed an unfair labor practice, the Petition invites the Court to impose severe constraints on Neises's freedom to agree with the Union and engage in the "rough and tumble" give and take of collective bargaining. For example, the Petition appears to deprive Neises of ever implementing a final bargaining proposal upon impasse without the agreement of the Union, a *non sequitor*, or without returning to the Court for the Court to decide whether an impasse was reached. Petition at 21 ¶6.

Similarly, the Petition would have Neises advise the Court and the Board if the FMCS or another government agency's assistance is needed to resolve a bargaining dispute and provide the agency copies of the Judgment and Consent Order while providing no basis for the demand imposed in mediation and how the

delivery of documents to that decisionmaker relates to curing the purported violation. Petition at 21 ¶7.

What the proposed action would do is subject and expose any FMCS Mediator to the Court's contempt jurisdiction, thereby warding off any such neutral mediator's participation and diminishing a potential avenue for the parties to voluntarily resolve differences whenever the Board does not agree with the Mediator.

Similarly, the Board requests the authority to direct "bargaining disputes" between Neises and the Union through involuntary "Court supervised mediation or interest arbitration" on any subject—mandatory or non-mandatory subjects of bargaining it deems Neises has not yielded, Petition at 21 ¶8, a power Congress prohibited in 29 U.S.C. §158(d).

In paragraph (b) on page 17, the relief sought would prevent Neises from withdrawing proposals or changing tentative agreements<sup>6</sup> as bargaining progresses on additional topics except upon the condition of a "bona fide change in

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<sup>6</sup>Changing economic circumstances may require regressive bargaining. *Hyatt Hotels Corp.*, 296 N.L.R.B. 239, 315 (1989) (rising business losses). "We have previously declined to find employers who withdrew provisions on which tentative agreement had been reached during negotiations to have failed in their bargaining obligations when the employer's explanation for its retraction did not indicate a lack of good faith." *Farm Boy Restaurants*, 279 N.L.R.B. 82, 83 (1986).

circumstances” rather than based on Neises’ economic ability,<sup>7</sup> the economy,<sup>8</sup> a worldwide pandemic or its bargaining leverage.<sup>9</sup>

Further, the Petition would have Neises pay the Union for costs and expenses when the Union was not a party to the prior Consent Order or made a financial beneficiary to it. As stated in Section 6 of the Consent Order, the obligations of the Board and Neises were exclusive and integrated. No other prospective penalties were agreed to or approved by the Court.

Given that the Board is a government entity, an award of fees is not normally applicable and no basis for the claim is suggested.

More important, while the parties dispute factual aspects of what

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<sup>7</sup> “[I]t is *not* a condition of good-faith bargaining that an employer’s proposals be based on ‘legitimate business justifications.’ The Board has held that an employer bargains in good faith when it ‘reasonably believes’ that its proposal ‘is fair and proper or that [it] has sufficient bargaining strength to force the other party to agree.’” *Phillips* 66, 369 N.L.R.B. No. 13 at 6 (2020) (emphasis in original), quoting *Atlanta Hilton & Tower*, 271 N.L.R.B. 1600, 1603 (1984).

<sup>8</sup> A “decision to eliminate the retroactive application of its wage and pension proposals cannot fairly be characterized as regressive or baseless” when based on an economic downturn. *Cook Brothers Enterpr.*, 288 N.L.R.B. 387, 388 (1988).

<sup>9</sup> As explained in *NLRB v. McClatchy Newspapers, Inc.*, 964 F.2d 1153, 1159 (D.C. Cir. 1992), the Act establishes bargaining strength as a core proposition: At the outset, it should be noted that a mandatory subject of bargaining does not lose status as such if one party seeks to gain complete control over the subject pursuant to collective bargaining....Rather, whether the subject will be committed to one party’s discretion or set by definite terms should be decided by bargaining and the relative economic strength of the employer and union.

occurred, Neises has not acted in a manner that justifies fees or any other penalty. Granted Neises did not sufficiently respond to the initial efforts to bargain in 2018, but it did respond later and followed every aspect of the Court's approach in the 2019 and 2020 Consent Orders on a timely basis.

This is not a case in which an employer is fighting with the Board in an unjustified and inappropriate manner. Neises has offered to meet with the Union on numerous occasions to reach agreement. The Regional Director and Assistant General Counsel have chosen to flatly refuse to compel the Union to do so. The General Counsel's office now seems more focused on punishing Neises rather than resolving this case by moving the bargaining negotiations along. Neises, however, remains welcoming to conferences or in person meetings with the Union, as its monthly outreach to the Union shows. *See Exhibit A.*

### **CONCLUSION**

This case has been presented in a manner to appear complicated. Neises bargained with the Union without event until the Union determined to make demands on non-mandatory subjects of bargaining and refusing to meet. Neises's goal remains to secure a contract. The Petition obviously asserts that Neises has not done all the Board wants it to do. Unfortunately, the parties disagree on the facts and the Board apparently disagrees that securing further bargaining is its goal.

For all these reasons, Neises respectfully asks the Court to deny the Petition filed by the Assistant General Counsel. Further, Neises, through counsel below, states that the information herein and in the Answer are sworn to be correct and truthful to the best knowledge of the same.

### **ANSWER AND AFFIRMATIVE DEFENSES**

1. Respondent admits the allegations in paragraph 1.
2. Respondent admits the allegations in paragraph 2.
3. Respondent admits the allegations in paragraph 3.
4. Respondent admits the allegations in paragraph 4.
5. Respondent admits the allegation in regarding affirmative action required by the Judgment and lacks understanding as to the undescribed “other things” alleged.
6. Respondent admits the allegations in paragraph 6.
7. Respondent admits the allegations in paragraph 7.
8. Respondent admits the allegations in the first sentence of paragraph 8 and admits the remaining quotations in the second sentence taken from portions of the Order are accurate.

### **2020 Consent Order**

9. Respondent admits the allegations in paragraph 7.

10. Respondent admits the Board asserted the allegations in the first clause of paragraph 10 and denies the remainder of the sentence.

11. Respondent admits the allegations in paragraph 11.

12. Respondent admits the allegations in paragraph 12.

13. Respondent admits the allegations in paragraph 13.

14. Respondent admits the allegations in paragraph 14.

15. Respondent admits the allegations in paragraph 15.

#### The Contumacious Conduct

##### Initial Bargaining Following Entry of the 2020 Consent Order

16. Respondent admits the allegations regarding meetings and negotiations, in paragraph 16, and denies only four contract articles remained to negotiate.

17. Respondent admits the allegations in paragraph 17 identifying its counsel and denies the remaining allegations of the paragraph.

##### Bargaining Following the Entrance of New Counsel for Neises

18. Respondent admits the allegations in the opening sentence of paragraph 18.

18 a. Respondent admits Robert T. Hanlon was one of Neises representatives attending the June 26, 2020, meeting alleged in paragraph 18a and denies the remaining allegations in subparagraph 18a.



18 b-d. Respondent denies the allegations in subparagraphs b-d.

18 e. Respondent admits the first three clauses of paragraph 18e and denies the fourth clause of paragraph 18e.

19. Respondent admits the allegations in paragraph 19.

20. Respondent admits the allegations in the first two clauses of paragraph 20 and denies the allegations in the remaining clause.

21. Respondent admits the allegations in paragraph 21.

22. Respondent admits the allegations in the first two sentences of paragraph 22, and the first clause of the second sentence and denies the conclusory allegation of the parties bargaining in the second clause of the second sentence.

23. Respondent appeared for bargaining on July 8, 2020, and admits the remaining allegations in paragraph 23.

24. Respondent admits the Union refused to appear for bargaining on July 8, 2020, and denies the allegations in the first sentence in paragraph 24 and admits the allegations in the second sentence of paragraph 24.

25. Respondent admits the parties communicated on July 27, 2020, and denies the remaining allegations and characterizations.

26. Respondent admits the allegations in paragraph 26.

a. Respondent admits that Hanlon provided written proposals to Union representatives at the commencement of the August 4, 2020, meeting and denies the remaining allegations in paragraph 26a.

b-c. Respondent denies the allegations in paragraph 26b-c.

d. Respondent admits the Union ended the meeting and denies the remaining allegations in paragraph 26d.

27. Respondent denies the allegations in paragraph 27.

27a-j. Respondent denies the allegations in subparagraphs 27a-j

28. Respondent denies the allegations in paragraph 28.

29. Respondent admits the allegations in paragraph 29.

30. Respondent admits its counsel communicated with the Union every month to establish bargaining dates and denies the remainder of the allegations in paragraph 30.

31. Respondent admits Neises communicated with the Union in emails on November 30, 2020 and December 11, 2020, to establish bargaining dates and denies the remaining allegations of this paragraph.

32. Respondent denies the allegations in paragraph 32.

32a. Respondent denies the allegations in paragraph 32a.

32b. Respondent denies the allegations in paragraph 32b.

Additional Respondents are in Contempt of the Court's Judgment

and 2020 Consent Order

33. The Respondent has no knowledge to admit or deny this allegation.

To the extent a response is necessary, Respondent denies the allegations in paragraph 33.

34. The Respondent has no knowledge to admit or deny this allegation.

To the extent a response is necessary, Respondent denies the allegations in paragraph 34.

#### Relief Requested

Neises denies the allegations in enumerated paragraphs 1-13<sup>10</sup> requesting relief in the WHEREFORE clause of the Petition, including subsections 3(a) –

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<sup>10</sup>Paragraph 9 of the relief requested by the Assistant General Counsel asserts the Union's exclusive representation status should be extended for six months. The Court may take judicial notice that employees filed a decertification petition with the Region on January 20, 2021, that is presently under consideration in a request for review with the Board. *In re Michael Halkias*, 13-RD-271580 (March 3, 2021); <https://www.nlr.gov/search/case/13-RD-271580>. The request seeks to interfere with the employees' statutory rights and preclude exercise of the Board's exclusive jurisdiction to decide whether a question concerning representation exists.

(g).<sup>11</sup> Petitioner has failed to show contumacious conduct, its entitlement to the relief requested, and therefore it is not entitled to the relief sought in the Petition.

Neises further denies that the prayer for relief in the Petition is supported by the facts and therefore no remedies are appropriate, and maintains that it has shown good cause it should not be held in civil contempt of the Court's Order.

Any allegation in the petition not admitted is denied by the Company.

WHEREFORE, Respondent Neises denies it has violated the Judgment and Consent Order of the Court, requests that the Petition be dismissed, and that costs and attorney's fees and costs be assessed against the Board under the Equal Access to Justice Act, 5 U.S.C. § 2412(a), for forcing it to defend against substantially unjustified claims, and for such further relief as may be just and proper.

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<sup>11</sup>The request in paragraph 3(a) that Neises not offer "predictably unacceptable bargaining proposals" is akin to claiming "no self-respecting union" would ever accept certain proposals, a claim condemned in the courts. *Gulf States Mfgs., Inc. v. NLRB*, 579 F.2d 1298 (5th Cir. 1978); *NLRB v. Tomco Comm., Inc.*, 567 F.2d 871, 883 (9th Cir. 1978) (a bargaining proposal viewed by the Board as ceding representational rights and therefore beyond the realm of negotiation "comes perilously close to determining what the employer should give by looking at what the employees want." Similarly, the request in paragraph 3(b) that the Union be empowered to cause Neises to withdraw any bargaining proposal "upon demand by the Union" interferes with the Labor Act and Neises' freedom of contract.

### **AFFIRMATIVE DEFENSES**

1. Petitioner cannot meet its burden for contempt because it submitted no evidence to establish, by clear and convincing evidence, that Neises violated the Court's judgment.

2. Neises is in substantial compliance with the terms of the Order and Judgment. Its compliance is demonstrated by admitted extensive bargaining sessions and securing of tentative agreements described in the Summary Response, providing counterproposals in collective bargaining with the Union and as shown in the specific responses to the allegations in the Petition.

3. Neises presented bargaining dates and alternative bargaining dates to the Union to continue collective bargaining every month as stated in two unfair labor practice charges filed by Neises.

4. Civil contempt is a remedial device that a court can utilize to achieve full compliance. As shown by the Petitioner's allegations above and conceded by Petitioner, Neises has complied with the Court's Judgment by meeting and bargaining with the Union, and therefore, civil contempt is not applicable.

5. The Board's claim that Neises concede to the Union's nonmandatory bargaining demand to present advance written bargaining proposals as a condition for bargaining violates the statutory scheme of collective bargaining in Section 8(d) of the Labor Act, 29 U.S.C. § 148(d).

6. The Board's request interferes with the fundamental policy of the Labor Act for parties to freely contract.

7. The Board requests this Court to "compel concessions or otherwise sit in judgment" of Neises's bargaining proposals contrary to the explicit Congressional prohibition in Section 8(d) of the Labor Act, 29 U.S.C. § 158(d), that the obligation to bargain "does not compel either party to agree to a proposal or require the making of a concession." *H.K. Porter Co. v. NLRB*, 397 U.S. 99, 106 (1970).

8. The Petition is not authorized by the Board under its regulations established in 29 C.F.R. Section 101.15, since it is not signed by the General Counsel.

9. No General Counsel appointed and confirmed with the advice and consent of the United States Senate as required by 29 U.S.C. §153(d), 29 C.F.R. §101.15, and the Appointments Clause in Article II, Section 2, Clause 2 of the United States Constitution, authorized this Petition to be filed.

10. Peter B. Robb, appointed by the President of the United States as General Counsel of the National Labor Relations Board and confirmed by the United States Senate for a four-year term as General Counsel of the National Labor Relations Board on November 8, 2017, did not sign the Petition.

11. Peter B. Robb did not resign from the position of General Counsel of the National Labor Relations Board. The President of the United States has no power to remove him.

12. The Petition seeks to undermine the Section 7 rights of employees to choose their bargaining representative by having the Court bar employees from exercising their statutory rights under Section 9 of the Act, 29 U.S.C. §159(a).

13. To the extent the Company's actions are deemed to be not in compliance with the Consent Order, any such failure is de minimis and was compounded by the Union's failure to select dates and times to hold bargaining sessions with Neises since August 2020.

14. The Court should exercise its equitable discretion to prevent the Board from harassing Neises when no confirmed General Counsel is in office.

Respectfully submitted,

BY: /s/ Michael E. Avakian

Michael E. Avakian  
PRAEMIA LAW, PLLC  
11710 Plaza America Drive, Suite 2000  
Reston, VA 20190

Dated: April 27, 2021

(703) 399-3603

**CERTIFICATE OF COMPLIANCE**

Pursuant to Federal Rules of Appellate Procedure 27(d)(1) & (2), the undersigned certifies this Response complies with the type-volume limitations of this Federal Rule.

1. This Response includes 5,192 words.
2. This Response has been prepared in proportionally spaced typeface WordPerfect X9 14 point Times New Roman. As permitted by Fed. R. App. Proc. 32(g)(1), the undersigned has relied upon the word count of this word-processing system in preparing this Certificate.

/s/ Michael E. Avakian

Michael E. Avakian

PRAEMIA LAW, PLLC

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(703) 399-3603

April 27, 2021



**CERTIFICATE OF SERVICE**

I hereby certify that the Motion for Substitution of Counsel was served on April 27, 2021, via this Court's CM/ECF notification system upon the following counsel of record to:

David P. Boehm  
National Labor Relations Board  
Contempt, Compliance, and Special  
Litigation Branch  
1015 Half Street, S.E., Fourth Floor  
Washington, D.C. 20003

/s/ Michael E. Avakian  
Michael E. Avakian

# EXHIBIT A

Indiana/Kentucky/Ohio Regional Council of  
Carpenters  
Case 13-CB-273050

### Confidential Witness Affidavit

I **Brian Neises** being first duly sworn upon my oath, state as follows:

I have been given assurances by an agent of the National Labor Relations Board (NLRB) that this Confidential Witness Affidavit will be considered a confidential law enforcement record by the NLRB and will not be disclosed unless it becomes necessary to produce this Confidential Witness Affidavit in connection with a formal proceeding.

I work at 1640 East North Street, Crown Point, IN 46307

My work phone number (including area code) is 219-663-3434

My e-mail address is [neises@neisesconstruction.com](mailto:neises@neisesconstruction.com)

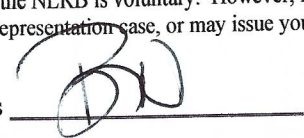
I am currently employed at Neises Construction Corp.

I am the secretary/treasurer of Neises Construction Corp. located at 1640 East North Street in Crown Point, Indiana. As part of case 13-CA-210180, the Employer and the seventh circuit court entered into a consent agreement which requires the Employer to bargain in good faith to reach an initial contract or impasse with the Union. The affidavit supplements my affidavit given on August 21, 2020 in case 13-CB-264210 and covers information related to the Indiana/Kentucky/Ohio Regional Council of Carpenters (Union) refusal to bargain in good faith.

Our last face to face meeting was held on August 4, 2020. We presented our proposal at this meeting with all of the Tentative Agreements (TAs) in it. I recall that attorney Suzanne Dyer and the Union stated that we were regressively bargaining without even looking at the proposal we had provided. The Union gave us an actuary report in writing and that was it. Dyer said there were only three or four sections to talk about and that is all they would discuss with us.

#### Privacy Act Statement

The NLRB is asking you for the information on this form on the authority of the National Labor Relations Act (NLRA), 29 U.S.C. § 151 et seq. The principal use of the information is to assist the NLRB in processing representation and/or unfair labor practice cases and related proceedings or litigation. The routine uses for the information are fully set forth in the Federal Register, 71 Fed. Reg. 74942-43 (Dec. 13, 2006). Additional information about these uses is available at the NLRB website, [www.nlr.gov](http://www.nlr.gov). Providing this information to the NLRB is voluntary. However, if you do not provide the information, the NLRB may refuse to continue processing an unfair labor practice or representation case, or may issue you a subpoena and seek enforcement of the subpoena in federal court.



Our attorney, Robert Hanlon tried to explain our proposal to the Union (consisting of Suzanne Dyer and Joseph Mallon— counsel, Scott Cooley and Eric Yuhasz- union reps. This meeting got nothing accomplished as the Union would not discuss any issues or articles with our bargaining team. They refused to look at our proposal either and we were asked to leave.

On August 21, 2020, Hanlon sent another e-mail to Dyer requesting bargaining since it had been a month since our last meeting and Hanlon asked that she get back to us when they wanted to meet. Dyer responded on August 28, 2020, by e-mail to Hanlon and she stated that due to what she called was our unreasonable and outlandish proposal we provided in bargaining, they would not meet at this time and stated the four articles they were only willing to discuss.

On September 10, 2020, Hanlon requested bargaining again and stated that if the Union wished to discuss any of the articles in our proposal we would be willing to discuss those. Hanlon also proposed three dates in October for meetings. There was no response from Dyer to this e-mail communication. On September 3, 2020, Hanlon repeated his request to bargain with Dyer. Again, there was no response from Dyer. On October 14, 2020, Hanlon provided his Declaration, spelling out his efforts on bargaining and the refusal of the Union to discuss the Employer's proposal or set further dates after August 4, 2020. The Union still had not responded to these requests.

When Hanlon had health issues, Michael Avakian, counsel, filed an appearance for the Employer and notified Dyer on November 25, 2020, of the Employer's request to bargain. Avakian gave alternate dates in November and December for bargaining and requested that due to COVID-19 and CDC guidelines, the parties should meet virtually. On November 30, 2020, Dyer responded and stated that the Union's position had not changed, that since the NLRB had found the August 4<sup>th</sup> proposal regressive, they would not bargain with us. She requested we



rescind that proposal and give an assurance that the TAs in place prior to that time would be in effect.

Avakian responded on December 3, 2020, and stated again there was no position taken by either party stating the TAs were not agreed to or in effect. He stated there had been no proposal on wages and benefits from the Union. He also stated that the Union pre-conditioning bargaining on us giving them our proposals in writing is unlawful. He stated the Employer is definitely willing to meet and would like to have a date scheduled by December 14, 2020.

Dyer e-mailed her response on December 11, 2020. She basically re-stated her positions from the previous e-mail about the NLRB findings and that we should give assurances about the TAs and the August 4<sup>th</sup> proposal. On January 12, 2021, Avakian sent another e-mail to Dyer asking for bargaining dates between January 25-29, 2021, and stating that we had never retracted any TAs and that she was twisting his words. He stated again that the Employer was willing and able to bargain and waited to hear from the union with dates. Dyer never responded to this e-mail and nobody from the Union responded either.

On February 11, 2021, Avakian again requested bargaining dates from Dyer. The Union has not responded at all to these requests. On March 2, 2021, Avakian sent another e-mail to Dyer asking for availability of the Union and giving March 15-19, 2021 for dates. Dyer responded that same day, saying the Union's position on bargaining remains the same and referred to the e-mail chain. There have been no further communications.

There have been no communications at all from the Union by phone either – we have been communicating entirely by e-mail. All of the e-mails described in the affidavit have been provided to the Board Agent and they speak for themselves. No agents of the Union have come to the Employer's location, tried to contact me about bargaining or anything else.

The Employer is willing and able to meet and bargain. We have not rescinded any TAs or the August 4, 2020, proposal (no need to do so). We only wanted to clarify those TAs. We have never said we are not agreeing to those agreed upon articles. The Union seems to continue to re-hash the same position back to us and refuses to meet based on unpublished NLRB findings.

**I am being provided a copy of this Confidential Witness Affidavit for my review. I understand that this affidavit is a confidential law enforcement record and should not be shown to any person other than my attorney or other person representing me in this proceeding.**

**I have read this Confidential Witness Affidavit consisting of 4 pages, including this page, I fully understand it, and I state under penalty of perjury that it is true and correct. However, if after reviewing this affidavit again, I remember anything else that is important or I wish to make any changes, I will immediately notify the Board agent.**

Date: 3-5-2021

Signature: \_\_\_\_\_

  
Brian Neises

Signed and sworn to before me by telephone on March 4, 2021

Christopher Lee

\_\_\_\_\_  
**Christopher Lee**  
**Board Agent**  
**National Labor Relations Board**

# EXHIBIT B

INTERNET  
FORM NLRB-508  
(2-08)

UNITED STATES OF AMERICA  
NATIONAL LABOR RELATIONS BOARD  
**CHARGE AGAINST LABOR ORGANIZATION  
OR ITS AGENTS**

DO NOT WRITE IN THIS SPACE	
Case	Date Filed
13-CB-264210	8/6/2020

INSTRUCTIONS: File an original with NLRB Regional Director for the region in which the alleged unfair labor practice occurred or is occurring.

1. LABOR ORGANIZATION OR ITS AGENTS AGAINST WHICH CHARGE IS BROUGHT			
a. Name INDIANA/KENTUCKY/OHIO REGIONAL COUNCIL OF CARPENTERS		b. Union Representative to contact Scott Cooley Title: Senior representative	
c. Address (Street, city, state, and ZIP code) 1560 E 70th CT IN Merrillville 46410-_____		d. Tel. No. (219) 393-8933	e. Cell No.
		f. Fax No.	g. e-Mail scooley@korcc.com
h. The above-named organization(s) or its agents has (have) engaged in and is (are) engaging in unfair labor practices within the meaning of section 8(b), subsection(s) (list subsections) (3) _____ of the National Labor Relations Act, and these unfair labor practices are unfair practices affecting commerce within the meaning of the Act, or these unfair labor practices are unfair practices affecting commerce within the meaning of the Act and the Postal Reorganization Act.			
2. Basis of the Charge (set forth a clear and concise statement of the facts constituting the alleged unfair labor practices)  --See additional page--			
3. Name of Employer Neises Construction Corp		4a. Tel. No. (219) 663-3434	b. Cell No.
		c. Fax No.	d. e-Mail neises@neisesconstruction.com
5. Location of plant involved (street, city, state and ZIP code) 1604 East North Street IN Crownpoint 46307-_____		6. Employer representative to contact Brian neises Title: president	
7. Type of establishment (factory, mine, wholesaler, etc.) Construction	8. Identify principal product or service	9. Number of workers employed 21	
10. Full name of party filing charge Brian neises Neises Construction Corp		11a. Tel. No. (219) 663-3434	b. Cell No.
		c. Fax No.	d. e-Mail neises@neisesconstruction.com
11. Address of party filing charge (street, city, state and ZIP code.) 1640 East North Street IN Crown Point 46307-_____			
12. DECLARATION I declare that I have read the above charge and that the statements therein are true to the best of my knowledge and belief. By Robert Hanlon (signature of representative or person making charge) ROBERT THOMAS HANLON Esq. (Print/type name and title or office, if any) Title: THE LAW OFFICES OF ROBERT T HANLON & ASSOCIATES PC 131 EAST CALHOUN Woodstock IL 60098-_____ Address _____ (date) 08/5/2020 18:56:46		Tel. No. (815) 206-2200 Cell No. Fax No. e-Mail robert@robhanlonlaw.com	

**WILLFUL FALSE STATEMENTS ON THIS CHARGE CAN BE PUNISHED BY FINE AND IMPRISONMENT (U.S. CODE, TITLE 18, SECTION 1001)**

**PRIVACY ACT STATEMENT**

Solicitation of the information on this form is authorized by the National Labor Relations Act (NLRA), 29 U.S.C. § 151 et seq. The principal use of the information is to assist the National Labor Relations Board (NLRB) in processing unfair labor practice and related proceedings or litigation. The routine uses for the information are fully set forth in the Federal Register, 71 Fed. Reg. 74942-43 (Dec. 13, 2006). The NLRB will further explain these uses upon request. Disclosure of this information to the NLRB is voluntary; however, failure to supply the information will cause the NLRB to decline to invoke its processes.



**Basis of the Charge****8(b)(3)**

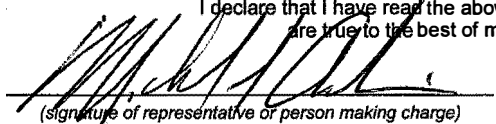
Within the previous six months, the above-named labor organization has failed and refused to bargain in good faith with the employer.

# EXHIBIT C

UNITED STATES OF AMERICA  
NATIONAL LABOR RELATIONS BOARD  
**CHARGE AGAINST LABOR ORGANIZATION  
OR ITS AGENTS**

DO NOT WRITE IN THIS SPACE	
Case 13-CB-273050	Date Filed 2/19/2021

**INSTRUCTIONS:** File an original with NLRB Regional Director for the region in which the alleged unfair labor practice occurred or is occurring.

1. LABOR ORGANIZATION OR ITS AGENTS AGAINST WHICH CHARGE IS BROUGHT			
a. Name INDIANA/KENTUCKY/OHIO REGIONAL COUNCIL OF CARPENTERS		b. Union Representative to contact Senior Representative Scott Cooley	
c. Address (Street, city, state, and ZIP code) 1560 E 70th CT Merrillville, IN 46410		d. Tel. No. (219) 393-8933	e. Cell No. (219) 393-8933
		f. Fax No.	
		g. e-mail scooley@ikorcc.com	
h. The above-named labor organization has engaged in and is engaging in unfair labor practices within the meaning of section 8(b) and (list subsections) (1) and (3) of the National Labor Relations Act, and these unfair labor practices are practices affecting commerce within the meaning of the Act, or these unfair labor practices affecting commerce within the meaning of the Act and the Postal Reorganization Act.			
2. Basis of the Charge (set forth a clear and concise statement of the facts constituting the alleged unfair labor practices) Within the past six months, the above-named labor organization as representative of the employer's employees has failed and refused to bargain in good faith with the employer on behalf of employees and to meet to bargain with the employer, made in employer requests to the labor organization on November 25, 2020, December 3, 2020, January 12, 2021, and February 11, 2021.			
3. Name of Employer Neises Construction Corp.		4a. Tel. No. (210) 663-3434	b. Cell No.
		c. Fax No.	
		d. e-mail neises@nesisesconstruction.com	
5. Location of plant involved (street, city, state and ZIP code) 1604 East North Street Brian neises IN Crownpoint 46307		6. Employer representative to contact	
7. Type of establishment (factory, mine, wholesaler, etc.) Contractor	8. Identify principal product or service residential concrete		9. Number of workers employed 9 unit employees
10. Full name of party filing charge Brian Neises			
11. Address of party filing charge (street, city, state and ZIP code) 1604 East North Street, Crownpoint IN 46307		11a. Tel. No. (210) 663-3434	b. Cell No.
		c. Fax No.	
		d. e-mail neises@nesisesconstruction.com	
12. DECLARATION I declare that I have read the above charge and that the statements are true to the best of my knowledge and belief.  (signature of representative or person making charge) Michael E. Avakian (Print/type name and title or office, if any)			Tel. No. (202) 540-9704
			Cell No.
			Fax No.
Address 1200 G Street, N.W., Suite 800, Washington, D.C. 20005 Date Feb 19, 2021			e-mail mea@wimlaw.com

**WILLFUL FALSE STATEMENTS ON THIS CHARGE CAN BE PUNISHED BY FINE AND IMPRISONMENT (U.S. CODE, TITLE 18, SECTION 1001)  
PRIVACY ACT STATEMENT**

Solicitation of the information on this form is authorized by the National Labor Relations Act (NLRA), 29 U.S.C. § 151 et seq. The principal use of the information is to assist the National Labor Relations Board (NLRB) in processing unfair labor practice and related proceedings or litigation. The routine uses for the information are fully set forth in the Federal Register, 71 Fed. Reg. 74942-43 (Dec. 13, 2006). The NLRB will further explain these uses upon request. Disclosure of this information to the NLRB is voluntary; however, failure to supply the information may cause the NLRB to decline to invoke its processes.